Office-Supreme Court, U.S.
FILED
JUL 29 1963
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1962

No. [redacted] 124

IN THE MATTER

OF

SWAN-FINCH OIL CORPORATION, KETA GAS AND OIL COMPANY, SWAN-FINCH PETRO CHEMICAL CORPORATION,

Debtors.

PETER JAKOBSON,

Petitioner,

AGAINST

GEORGE C. LEVIN and JAMES V. HALLISEY, Trustees of SWAN-FINCH OIL CORPORATION, KETA GAS AND OIL COMPANY and SWAN-FINCH PETRO CHEMICAL CORPORATION,

Respondents.

REPLY TO RESPONDENTS' BRIEF IN OPPOSITION

DAVID W. KAHN and
WILLIAM M. KAHN,
Counsel for Petitioner,
120 Broadway,
New York 5, N. Y.

ARTHUR D. EMIL,
Co-Counsel for Petitioner,
32 East 57th Street,
New York 22, N. Y.

LODER APPEAL PRESS, INC., 41 VESEY STREET, NEW YORK, N. Y. WOrth-2-0689

INDEX

PAGE

Statement 1

REPLY POINT I.—Petitioner did not waive the demand for a bond under Rule 65(c) of the Federal Rules of Civil Procedure 7

REPLY POINT II.—Petitioner is a real party in interest and has standing, therefore, to review the ruling of the Court below confirming Judge Palmieri's appointment of a Receiver 9

REPLY POINT III.—Respondents still fail to meet the paramount issue in this case which is that by discontinuing their suit against Petitioner and obtaining the appointment of a Receiver, they have deprived Petitioner of any forum or opportunity to try out the merits of this action so far as pertains to Petitioner's lease 11

REPLY POINT IV.—The appointment of a Receiver by the Federal District Court is governed by rules and statute and is not merely a matter of personal discretion on the part of a District Judge 13

INDEX TO APPENDIX:

Reply Affidavit of Arthur D. Emil 1a-13a

CASE CITED

PAGE

Halpert v. Engine Air Service, 212 F. (2) 860 ... 8

STATUTES CITED

Federal Rule 81(a)(1) ... 8

Federal Rules of Civil Procedure:

Rule 65(c) ... 8, 9

Rule 41a ... 11

General Rules of the U. S. District Court, Southern District of New York, Rule 21c ... 11

IN THE

Supreme Court of the United States

OCTOBER TERM 1962

No. 1092

In the Matter

of

SWAN-FINCH OIL CORPORATION, KETA GAS AND OIL COMPANY, SWAN FINCH PETRO CHEMICAL CORPORATION,

Debtors.

PETER JAKOBSON,

Petitioner,

AGAINST

GEORGE C. LEVIN and JAMES V. HALLISEY, Trustees of SWAN-FINCH OIL CORPORATION, KETA GAS AND OIL COMPANY and SWAN-FINCH PETRO CHEMICAL CORPORATION,

Respondents.

REPLY TO RESPONDENTS' BRIEF IN OPPOSITION

Statement

Respondents, for their answer to the petition for certiorari herein, filed a brief and appendix which deals only in part with the issues presented on the present appli-

cation. Most of the allegedly additional parts of the "record" supplied relates to other proceedings affecting altogether different parties with whom Petitioner has no connection whatsoever. There is, we submit, no excuse for the inclusion of these extraneous papers in the record.

It is obvious that most of the Respondents' brief and the extraneous papers printed in the appendix which deal with Lois B. Morrill represent nothing but a calculated effort to spread such an atmosphere of prejudice over this whole case so as to obscure the few simple legal questions presented. And this effort is a very unfair one because, as we stated in our original petition for certiorari, Respondents' counsel in the hearing of the argument before Judge Palmieri in the District Court had completely exonerated Petitioner from all charges of connivance with Lowell Birrell and of any other species of wrongdoing or sharp practice. Respondents now seek to paint an entirely different picture of Petitioner and present him to the Court as a creature of the Birrells, tarred with the same paint as the Birrells and one who is entitled to no consideration whatsoever from this Court because he is nothing but a dummy for Herbert Birrell.

Nor is this all. In a further effort to poison the atmosphere of the proceeding, Respondents' counsel have printed in their appendix papers that were never before Judge Palmieri or the Court of Appeals and which, indeed, have no relation to Petitioner's claim under his lease of the property here involved. For example, there is printed in the Appendix, an affidavit of James V. Hallisey, one of the Respondents, on a motion to dismiss the Petitioner's appeal in the Court of Appeals together with notice of motion thereto attached (3a to 11a); also an affidavit of J. F. Kelly who was appointed Receiver of the property by Judge Palmieri, (11a to 18a). The affidavit of Hallisey is replete with conclusory statements and arguments

of a highly prejudicial character—though far short of probative facts. The affidavit of Kelly deals only with his conduct of the receivership and of necessity does not and cannot touch upon the origin of the lease or the conditions under which this lease was negotiated. It therefore has no probative effect.

The Appellate Court below did not grant Respondent's motion to dismiss the appeal. On the contrary, the Court proceeded to hear the appeal and it is from its determination after the hearing that this petition for certiorari is made. The inclusion of motion papers furnished in connection with a motion to dismiss an appeal is not only totally unwarranted but completely misleading—almost purposefully confusing. The proper record on appeal, under the rules in the Court of Appeals for the Second Circuit and the rules of this Court, does not include the unsupported allegations set forth in the affidavit. It was for that reason, obviously, that the certification of the Clerk of the Court of Appeals did not include these papers.

Proper balance of the record before the Court at this time, however, must require that the conclusory and unsupported material furnished in the irrelevant affidavit be supplied with some response. Thus, if papers in support of the already moot motion to dismiss the appeal made by Respondents are included in the record here, the reply affidavit submitted at the same time should also be available. For this reason, Petitioner includes, albeit reluctantly, as an appendix to this reply brief, the reply affidavit of Arthur D. Emil, attorney for Petitioner, in the Court of Appeals.

Still further: It was even more indefensible for Respondents to print in their Appendix the opinion written by Judge Palmieri on April 29, 1963 (21a to 30a) on a

completely different and subsequent motion made by Respondents against one Lois B. Morrill, having to do with the collection by her of interest on two mortgages which she owned. This motion against Lois B. Morrill was made long subsequent to the appointment of the Receiver in the instant case. Petitioner was in no way involved in this motion against Lois B. Morrill nor did he appear therein. Why, therefore, was this later opinion of Judge Palmieri, in a different matter, printed in the Respondents' appendix? The obvious answer is that this opinion excoriates the fugitive, Lowell Birrell, who is now in Brazil. It was evidently the notion of Respondents that by pouring more prejudice into the record everyone who ever had anything to do with any Birrell is, of necessity, tainted. Clearly, this later opinion in an entirely different proceeding ought to be disregarded by this Court.

When the instant matter was before Judge Palmieri on November 1, 1962, the following is what Mr. Levin, Respondents' counsel, said to the Court concerning the Petitioner:

> "Incidentally, with respect to the respondent Jakobson, who for the purpose of this discussion I will concede is an honest individual who entered into this for the laudable purpose of trying to make some money. He can't be criticized for that. We don't charge him with being privy or party to any of the machinations in which any of the Birrells are involved."

In the light of the foregoing, this Court can judge of the sincerity of Respondents' vehemence in characterizing Petitioner (p. 4 of the Answer) as "a stooge acting for Herbert Birrell * * *" and asking "How brazen" Petitioner can get in calling himself a "bona fide obligee".

And it should be further mentioned that at page 57 of the transcript of the same hearing before Judge Palmieri on November 1, 1962, the following is what Mr. Levin, Respondents' counsel, again said:

> "I know nothing to base any criticism on either Mr. Emil or his client." (Petitioner).

Before proceeding with the discussion of the legal points mentioned in Respondents' Answer and brief the Court's attention should again be directed to the fact that the parcel of real estate here in controversy was never owned by the debtor corporations; nor is any claim made that any moneys of the debtor corporations were ever used by Lowell Birrell to acquire this property. Title to the property was acquired in March 1944 by Ruby Trading Corp. of which, as the petition for certiorari reveals, Lowell Birrell owned only 25% of the stock. That factual allegation is not denied in Respondents' brief in opposition. Ruby, as far back as February 16, 1951, deeded this property to Petitioner's lessor, Herbert A. Birrell, who has had the title ever since. While we are not here concerned with the status of Herbert A. Birrell, it is to be noted that, unlike his brother Lowell Birrell, he has not been indicted or charged with any diversion or concealment of assets of the debtor corporations. Since the petition for reorganization herein was only filed in 1959, it will be apparent that the Respondents' claim that they may be able, hereafter, to establish some claim to this property as a part of the assets of the debtor corporations, is not only far fetched but so improbable as to be worthy of no serious discussion.

As was pointed out in our petition for the writ of certiorari, the sole ground on which the Respondents can hope to establish any claim in or against the real estate

is that Lowell Birrell still retains an interest in the property despite the unconditional transfer of the fee to Herbert Birrell in 1951; that Lowell Birrell is indebted to the Respondents on a claim which they have against him for diversion of assets of the debtor corporations; and that a receivership of the property is necessary to protect the Respondents' recovery—if and when they get one—so that it may be satisfied out of Lowell Birrell's interest. It has already been mentioned in our petition for certiorari that the theory of the suit brought in the District Court by Respondents is that Lowell Birrell, many years before the reorganization of the debtor corporation, conceived a plan to defraud his *future* creditors and that therefore, any transfers made by him, even as far back as 1944 can be attacked.

Patently, what Respondents were really seeking on their application in the District Court was an attachment of any possible interest that Lowell Birrell had in the property so that out of such attached property any judgment recovered by them could be satisfied. But the Respondents asked, not for an attachment of Lowell Birrell's interest—which they could have gotten under the provisions of the New York Civil Practice Act (Section 902), but instead, to a receivership of the whole property, the effect of which was to divest Petitioner, a concededly *bona fide* and legitimate lessee, of whatever bargain he made when he undertook to enter into a five-year operating lease of the property with Herbert Birrell—not with Lowell Birrell.

The fact that Lowell Birrell is a fugitive in Brazil under indictment in the United States, and that Herbert Birrell sees fit to reside in Canada can have no legitimate bearing upon the *bona fides* of Petitioner's lease. Respondents' counsel have conceded that Petitioner acted

fairly and is not involved in any improper acts or any connivance with the Birrells.

The basis upon which Respondents have sought to invalidate Petitioner's lease is that he paid no money to get it; that the lease contained cancellation provisions authorizing cancellation of Petitioner's interest upon giving him a certain amount of notice and that having taken a lease subject to cancellation and having paid no money to get the lease, Petitioner had no standing to oppose the receivership and has no standing to review the Court's determination ousting him as lessee of the property through the appointment of a receiver.

It is to be noted that Mr. Kelly was appointed receiver of the property, not receiver of Herbert Birrell. No argument has been submitted to show how a mere receiver of a parcel of real estate has power to disaffirm a lease entered into in good faith. How can such action be supported?

REPLY POINT I

Petitioner did not waive the demand for a bond under Rule 65(c) of the Federal Rules of Civil Procedure.

In Point III of their brief, Respondents assert that the demand for a bond on the part of Petitioner is an afterthought not raised in the Court below, for which reason the claimed conflict among the circuits on the interpretation of that rule is immaterial. That contention is not justified. The applicability of Rule 65(c) was argued thoroughly on the hearing before Judge Palmieri. Indeed, Judge Palmieri himself said at page 26 of the transcript of said hearing, the following:

"The Court: Well, it was essential to the decision.

The legal position of the plaintiffs seeking the receivership was much bruited in the case in connection with the application of the rules of civil procedure, and particularly Rule 65 with respect to giving them a bond insofar as the injunctive aspects of relief were concerned; and the court had occasion to refer to Rule 81(a)(1), which provides that these rules do not apply to proceedings in bankruptcy except insofar as they may be made applicable thereto by rules promulgated by the Supreme Court of the United States.

I suggest that you give some attention to that decision because my feeling is that they have a right to seek a receivership."

Furthermore, Respondents' counsel, to support his argument that no bond could be required, referred at page 3 of the transcript, to the case of *Halpert* v. *Engine Air Service*, 212 F. (2) 860 (2nd Circuit)—the correctness of which decision this Court decided to review by granting certiorari (348 U. S. 854 (1954). Unfortunately, as we have mentioned, the parties stipulated to withdraw such application.

It is plain from the foregoing that Judge Palmieri held that Rule 65(c) was inapplicable because Federal Rule 81(a)(1) did not apply to proceedings in bankruptcy. That this view is erroneous has been amply demonstrated, we believe, in our petition.

There thus remains a conflict between the circuits in regard to the applicability of Rule 65(c), as we have set forth more fully at pages 8 to 10 of our petition for

certiorari. The importance of resolving this conflict is manifest; as is also the necessity for settling the legal point as to whether Rule 81(a)(1) applies to this plenary suit.

REPLY POINT II

Petitioner is a real party in interest and has standing, therefore, to review the ruling of the Court below confirming Judge Palmieri's appointment of a Receiver.

At page 4 of their answer, Respondents again repeat their utterly unfounded argument that the lease held by Petitioner can be summarily disregarded by the receiver appointed by Judge Palmieri. To support that claim, Respondents assert (see p. 4 of answer):

> "Petitioner paid no money for a lease to a fourteen story apartment building at 1050 Park Avenue (87th Street) New York City."

The notion that a party taking a lease of real estate must make a money payment to the lessor as consideration for a valid and binding lease is not only legally untenable but entirely irrelevant to the issue raised by this proceeding. As already noted in the petition for certiorari, there was more than ample consideration given by Petitioner herein for the execution of the lease. These included his assumption of the numerous definite and contingent obligations with respect to the operations of the building including the operation of the property, the taxes, wages, materials, supplies, and related items. In addition, Respondent ignores the basic reason for the making of this lease, namely, the effort to increase the rent roll

in a rent-controlled building which increases would determine in part the compensation to be received by the lessee.

To assert that such a lease with mutual obligations on both sides conferred no property right in Petitioner and that, therefore, the receiver could summarily cancel this lease is not only unconvincing but completely without legal warrant.

Of course, Respondents recognize the weakness and fallacy of their argument and therefore do not rest on that alone. They now go on to say that Petitioner was only a stooge and dummy and that since his lessor gave up his apartment in New York and fled to Canada, Petitioner cannot be a *bona fide* obligee. The irrelevancy and unfairness of this type of argument will not be lost on the Court. The fact that Lowell Birrell fled to Rio can have nothing to do with the validity of the lease made by Herbert Birrell with Petitioner. Herbert Birrell is under no charges or indictment. While it is unfortunate from the point of view of Petitioner's position in this litigation that Herbert has seen fit for reasons of his own to remain in Canada, this cannot have a direct bearing on Petitioner's position. This is especially true since it is not even claimed by Respondents that Herbert is holding any assets of the debtor corporation or that he has been directly involved in any conspiracy to divert or conceal assets of the debtor corporations. Petitioner himself is even further removed from any accusation of wrongdoing or impropriety.

As yet, the Respondents are asserting only unproved claims against Lowell Birrell for diversions of assets. Until these claims are proved and they have judgments

against Lowell Birrell they have little standing to assail transactions had, not by the debtor corporations with Herbert Birrell, but between Herbert Birrell and the Petitioner, a completely innocent party, according to the concessions made by Respondents, and one involved in no wrongdoing of any kind.

REPLY POINT III

Respondents still fail to meet the paramount issue in this case which is that by discontinuing their suit against Petitioner and obtaining the appointment of a Receiver, they have deprived Petitioner of any forum or opportunity to try out the merits of this action so far as pertains to Petitioner's lease.

Respondents admit they discontinued their suit against Petitioner; but they allege this was done with Petitioner's consent. It is difficult to understand how Petitioner could have prevented a discontinuance of the suit by Respondents, in view of the specific provisions of Rule 41a of the Rules of Civil Procedure and Rule 21c of the General Rules of the United States District Court, Southern District of New York.

When Respondents presented this discontinuance order they knew that the effect of it was to deprive Petitioner of any forum to litigate the merits of his lease. As matters stand now, there is no such forum. By commencing a suit against Petitioner and then discontinuing against him, and at the same time taking away the property covered by his lease, the Respondents have achieved what they could only get on a complete victory in the lawsuit.

Certainly, this procedure not alone is unprecedented, but on its very face is invalid.

It is to be noted that on the application made by Respondents against Lois B. Morrill, to which reference has been made by Respondents in their appendix, Judge Palmieri, in his opinion granting an injunction against the collection of interest on her mortgages by Mrs. Morrill, specifically provided as follows (app. 30a):

> "The order should provide that the trustees are to commence, within a reasonable time of the filing of the order, an appropriate plenary action that will serve to present for a full trial the issues between Mrs. Morrill and the trustees. Mrs. Morrill may, within a reasonable time after the filing of such action, apply to this Court to have the preliminary injunction vacated, if the trustees have not proceeded with due diligence to secure a speedy trial for the issues in this case. Platt & Munk Co. v. Republic Graphics, Inc., Nos. 27867, 27904, 2d Cir., March 21, 1963; Steelman v. All Continent Corp. 301 U. S. 278, 290 (1937)."

Why was not a similar provision made on the granting of the motion against Petitioner herein, and why was he deprived of "a proper plenary action that will serve to present for a full trial the issues" between him and the Respondent Trustees. This is the very heart of the case and on that the Respondents are completely silent.

REPLY POINT IV

The appointment of a Receiver by the Federal District Court is governed by rules and statute and is not merely a matter of personal discretion on the part of a District Judge.

Under Point I of their brief, Respondents seek to support the appointment of a Receiver by Judge Palmieri on the ground that this involves purely a matter of discretion. The Federal Rules and Statutes which we have discussed in our main application for certiorari clearly established that the appointment of a receiver is more than a matter of personal judgment or discretion. If it were otherwise, then no appointment of a Receiver could ever be reviewed.

Respectfully submitted,

DAVID W. KAHN and
WILLIAM M. KAHN,
Counsel for Petitioner.

ARTHUR D. EMIL,
Co-Counsel for Petitioner.

DAVID W. KAHN,
WILLIAM M. KAHN,
ARTHUR D. EMIL,
LAWRENCE A. KOBRIN,
Of Counsel.

Reply Affidavit of Arthur D. Emil

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 27885

In the Matter

of

SWAN-FINCH OIL CORPORATION, KETA GAS AND OIL COMPANY, SWAN-FINCH PETRO CHEMICAL CORPORATION, Debtors, by GEORGE C. LEVIN and JAMES V. HALLISEY,

Petitioners-Appellees,

AND

PETER JAKOBSON,

Respondent-Appellant.

State of New York
County of New York—ss.:

ARTHUR D. EMIL, being duly sworn, deposes and says:

1. I am the attorney for appellant Peter Jakobson and am fully familiar with all of the facts and circumstances surrounding the above-captioned appeal and the orders below from which the appeal is taken.

2. I make this affidavit in support of appellant's motion for a stay of the Temporary Receiver, pending the hearing and determination of this appeal, and in opposition to the appellees' cross-motion to dismiss this appeal.

3. Briefly stated, it is appellant's position with respect to his motion solely for a stay of certain actions of the Temporary Receiver and the opposing cross-motion to dismiss the entire appeal, that appellees' affidavits are erroneous in several crucial respects:

(a) Appellees have grossly and unfairly summarized the state of the proceedings below. Neither appellant nor his attorney ever consented to the entry of the order appointing the Temporary Receiver. Appellees have sought to confuse the status of the District Court proceedings by treating as equivalent the pending civil action and the pending bankruptcy order.

(b) Appellees have sought to cast doubt upon appellant's standing to appeal from the time that the plenary action below was discontinued. In so arguing, they ignore all proceedings which led to the order from which the appeal pending in this Court is taken.

(c) Appellees seek to misuse the discretionary form of dismissal of appeal in a case clearly beyond the bounds of the normal exercise of this method of appeal administration. They would seek to deny in "summary" fashion any right to appellate review by appellant.

(d) Appellees similarly seek to ignore the substantial questions on appeal raised by the District Judge himself in the course of his original opinion accompanying the first order to which this appeal is directed. Such questions cannot be ignored by a motion to dismiss an appeal.

(e) Appellees would have this Court deny the stay sought by appellant by arguments directed to relief never asked by appellant. Properly viewed, the stay requested is a proper and appropriate form of protecting the right of appellant until this Court makes its determination.

PROCEEDINGS BELOW

4. Both opposing affidavits place great stress on, and there is much underlining with respect to, the fact that the November 30 order was indeed physically typed in my office. The affidavits of Messrs. Hallisey and Kelly tell only part of the story, however.

5. The inexact wording of the order of November 7 prepared by the Trustees for the signature of Judge Palmieri, together with its patent failure even to conform with Judge Palmieri's decision, led to a certain amount of confusion. After the appointment of the Temporary Receiver, several discussions were held since strict compliance with the terms of the order of November 7 would have brought virtually all building management operations by Mr. Jakobson to a complete standstill.

6. At a certain point, after various phrases had been prepared, compared, and discussed, a version of the required words was suggested as conforming the order to the decision. At no time did I, on behalf of the appellant, consent to the order. In fact, in connection with the settlement of the order, I stated in paragraph 3 of my affidavit sworn to November 27, 1962, in commenting on the proposed changes: "Accordingly, respondent [Jakobson] wishes to place upon the record the fact that any

comment included herein in response to the application made by the Trustees shall not be deemed or construed as a consent to the basis of the original order or as a withdrawal of his appeal or otherwise prejudice the pending appeal."

7. At the time the matter came before Judge Palmieri for an informal hearing, on November 27, 1962, I was specifically asked by the Trustees to consent to the new order. I refused. Interestingly enough, I was subsequently informed by Mr. Hallisey that the primary reason that the Temporary Receiver had cancelled my client's lease was that I had refused to consent to the order of November 30.

8. The reason that the order was physically typed on the typewriters of my office was a matter of convenience to both the Court and Mr. Hallisey. At the hearing before Judge Palmieri, I suggested that the new order which Judge Palmieri indicated he would sign should be a complete order rather than one suggested by Mr. Hallisey which would amend the paragraphs by adding and deleting words and paragraphs as suggested in Mr. Hallisey's affidavit in support of his motion for resettlement. Mr. Hallisey said that he did not have the secretarial force available to type the order in that form. I suggested that I could arrange to have the order physically typed since I had more secretaries in my employ than Mr. Hallisey. I also have some recollection that it was at approximately that same time that Messrs. Hallisey and Levin were moving their office to 745 Fifth Avenue. I am rather surprised that counsel would seek to turn a favor done by an attorney against him.

9. To say, therefore, that the appellant's attorney "prepared" the order of November 30 or that it is his "own order" is completely misleading.

10. It is similarly misleading to state, without further explanation, that the order entered by Judge Weinfeld permitting the plenary action to be withdrawn against Jakobson without prejudice was completely consented to by appellant in the Court below. The fact of the matter was that a proposed counter-order was submitted to Judge Weinfeld, together with a memoradum in support of said counter-order. In all likelihood, an appeal will be taken from this order, and Mr. Hallisey was personally so advised on January 3, 1963 at the instant he advised deponent that Judge Weinfeld had signed the order submitted by Mr. Hallisey.

11. In paragraph 6 of Mr. Kelly's affidavit, the statement is made that appellant did not and could not have any valid objection to the appointment of Mr. Kelly as Temporary Receiver for Herbert Birrell. This is completely incorrect. It has always been appellant's position that if a Temporary Receiver is *validly* appointed and if the Temporary Receiver so appointed cancels appellant's lease, this would probably not be reversible since a validly appointed Receiver would step into the shoes of appellant's lessor. This should not be confused with the absence of objection to Mr. Kelly personally as Temporary Receiver if one is validly appointed since Mr. Kelly is a responsible member of the Bar. The appointment of the Temporary Receiver, however, was challenged from the very day a Temporary Receiver was appointed.

12. On page 3 of Mr. Hallisey's affidavit, he claims that I personally admitted that Jakobson was duped and

the Temporary Receiver could cancel the lease. This is a complete misrepresentation of the conversation before Judge Palmieri. I then stated in response to Mr. Hallisey's comment that Jakobson was "duped by Herbert Birrell" that even if it were so, *arguendo*, such a state of affairs would not deprive appellant of the right to seek to maintain his interest in the property. I further stated, as indicated above, and it has always been appellant's position in this matter, that if the Temporary Receiver was *called* appointed, he could probably cancel the lease.

13. One point must be made. The record of this case will show that the first order of Judge Palmieri was served on deponent November 8, 1962. The notice of appeal was filed the very same day. The second order was received in my office December 3, 1962. The notice of appeal was filed December 5, 1962. Surely, this is hardly consistent with any consent whatsoever to the proceedings herein.

STANDING OF APPELLANT

14. The Trustee and Temporary Receiver apparently contend that the discontinuance of the plenary action in the Court below, with respect to appellant deprives appellant of his standing in this Court. Their position completely ignores the fact that the appellant was named as a respondent by the Bankruptcy Court in an Order to Show Cause which led to the appointment of a Temporary Receiver and, even after the modification of the order of appointment, appellant was specifically named in and served with that order.

15. Whatever theoretical rights appellant might be said to have had as of November 20 are certainly confirmed by the subsequent actions of the Temporary Receiver who has now cancelled appellant's lease. The Trustee and Temporary Receiver completely ignore the fact that appellant, in this appeal, contests the very basis of the appointment of any Receiver in this action. Clearly, appellant is sufficiently "aggrieved" by the order of the District Court and the subsequent action of the Temporary Receiver and cannot be entirely deprived of his right to review that action at the appellate level.

16. If appellees' position were to be accepted as a rule of law, then any action ever taken by a Bankruptcy Court in support of a pending plenary civil action could be "insulated" from appellate review by the mere expedhency of discontinuing the plenary action itself once the Bankruptcy Court had asserted and obtained jurisdiction or possession of an asset geographically located within its jurisdiction.

17. Such a procedure, of course, is on its face an effort to maintain a quasi-in-rem action, not permitted under Federal practice. The appellees themselves admit that they have not been able to serve respondent Herbert Birrell. They do not even allege any efforts to obtain some form of substituted service upon him, but seek to cure this omission by long, and essentially irrelevant, recitation of the allegedly nefarious activities of both respondent Herbert Birrell and his brother. They have not served Roby Trading Corp. either directly or through the Secretary of State.

18. Deponent respectfully submits that the recitations are not competent to afford a "summary" disposition of

an appeal by motion to dismiss nor substitute for required jurisdiction and competence in the Court below.

19. Mr. Hallisey fails to report accurately the final position of Judge Palmieri himself with respect to standing. It is true that in granting the first order extending the time within which to file the record, Judge Palmieri made the comment set forth in the memorandum opinion which is part of the record on appeal and which is quoted by Mr. Hallisey on page 6. Subsequently, however, the Judge was asked to fix the contents of the record on appeal. He did so without making any limiting statement. In fact, at that time, the Judge stated orally that appellant could and should not be barred from judicial review of the actions taken below.

20. Even if the Judge had not so stated, it is neither he nor the Trustee who must determine the right to appeal, but this Court alone.

MOTION TO DISMISS APPEAL

21. Deponent also respectfully submits that the relief sought by the appellees in making a motion to dismiss the appeal is not proper. In the Federal courts, dismissal of an appeal is normally restricted to cases where appellants have failed to comply with the various procedural requirements for appeals outlined in Rule 73 or in local rules. Here, appellees seek in effect a summary disposition of the very question with respect to which appellant seeks review by this Court. Deponent respectfully submits that this would not be a proper exercise of the discretionary power given to this Court by the Federal

Rules, to dismiss appeals absent any hearing whatsoever on the merits of the appeal itself.

22. If the papers furnished by the Trustee and the Temporary Receiver demonstrate anything, they clearly show that there is adequate standing on the part of the appellant. Such standing should not be summarily dismissed on the basis of procedural questions.

Merits of Appeal

23. As already noted, it is appellant's contention in this Court that the District Court did not have the power to appoint a Temporary Receiver under the circumstances before him. While it is true that the appointment of a Temporary Receiver is a discretionary act, that discretion is bounded by specific limitations. The Trustee and Temporary Receiver point to the fact that the property is located within the geographical confines of the District Court. That of itself can scarcely be said to give the District Court the right to appoint a Receiver. Similarly, the absence from the jurisdiction of the fee owner of a property does not create any power in the Court below.

24. The opinion below itself pointed to some of the difficulty in connection with the appointment of a Temporary Receiver at the then status of the proceedings. The Trustee and Temporary Receiver have ignored the very legal questions which troubled the District Judge and which must be subject to appellate review. These included (1) the question of the Power of the *Bankruptcy Court* to appoint any Receiver *after* an adjudication, (2) the question of the nature of protection to which appel

lant is entitled under the provisions of the Bankruptcy Act, (3) the question of the appropriateness under State law, to which the Bankruptcy Act requires reference, of the effort to assert jurisdiction over the property on the basis of the facts alleged, and (4) the various other matters outlined in deponent's moving affidavit now before this Court.

25. Certain of the facts as set forth in the affidavits submitted by Messrs. Hallisey and Kelly must not stand without a denial. Jakobson is not an agent or subordinate of Herbert Birrell. The lease which he signed imposes great financial responsibilities upon him, and to claim that he is a simple agent is wrong.

26. The Trustees say that they do not know the exact whereabouts of Herbert Birrell. In a conversation with Mr. Robert Nolan, counsel for Herbert Birrell, on January 11, 1963, I was advised that the Trustees never asked for Birrell's address. Furthermore, the Trustees would have this Court believe that Herbert Birrell refused to meet with the appellees in Canada. Mr. Nolan advised me that this, too, was untrue. A reading of the hearing before Judge Palmieri will indicate that Mr. Levin, one of the co-Trustees, stated "if I could avoid going further into Canada, I would prefer it" (page 55). The Court replied, "Well, I don't blame you. I don't blame you" (page 55). Mr. Levin stated, "It is getting cold up there besides" (page 55). The matter ended there.

27. The Trustees' affidavit states that the Jakobson lease required Jakobson, as lessee, to turn over the remaining income of the building after certain expenses to Herbert Birrell's attorney. This is a complete mis-

statement of the terms of the lease which are before the Court on the appeal and which need not now be spelled out.

28. There are numerous other misstatements, inaccuracies and misinterpretations of testimony before the Court contained in Mr. Hallisey's affidavit. However, they are basically irrelevant in any event and the Court should not be burdened with them at this time.

29. For all of the foregoing reasons, as well as those others outlined in the moving affidavit, it is respectfully submitted that appellant has the standing to appeal the order and has reasonable chances for success on the appeal. The motion to dismiss the appeal must, therefore, be denied and a full opportunity afforded to appellant to present his position and argument to this Court for its determination.

MOTION FOR STAY

30. The Trustees and the Temporary Receiver themselves point to the fact that the property concerned is real property located within the geographical jurisdiction of the Court. Appellant himself is a permanent resident of New York State. Neither he nor the building is likely to vanish from the jurisdiction.

31. In their opposition to appellant's request for a stay, the Trustee and Temporary Receiver have misconceived the extent of the relief requested by this motion. Appellant has not asked (as have appellees) that his appeal be summarily granted and that the Temporary Receiver be ousted forthwith from all jurisdiction over

the property. Instead, appellant has requested that the Temporary Receiver not be permitted to take such action which would render the appeal useless. As set forth in appellant's supporting affidavit, the precipitous interruption of appellant's relationship to the property by the Temporary Receiver—which may well be found to be improper by this Court—would permanently deprive the appellant, and ultimately any party found entitled to the fee ownership, of a substantial economic profit.

32. The gratuitous remark by the Temporary Receiver, who has shown no particular experience in the management of urban residential property, that the property is apparently managed in "normal fashion," wholly ignores the fact presented by appellant's supporting affidavit.

33. Appellant Jakobson has pointed out that in the eight months that he has been operating the property, the rent roll increased more than $24,000. Deponent respectfully submits that such an increase can hardly be considered "normal". It should be noted, too, that even at a conservative capitalization rate of six times the rent roll, the appellant has already created an increased economic value of not less than $144,000 equity in the property. With all due respect to the Temporary Receiver, his assurances that he will himself endeavor to obtain further rent increases cannot be substituted for appellant's professional experience and obvious success with respect to this property.

34. The request for a stay made by appellant is directed solely at the irreparable harm which would result from his proposed termination.

WHEREFORE, it is respectfully submitted that the appellant's motion for a stay of the Temporary Receiver should be granted and the appellees' motion to dismiss the appeal should be denied.

ARTHUR D. EMIL

Sworn to before me this
14 day of January, 1963.

LAWRENCE A. KOBRIN

LAWRENCE A. KOBRIN
Notary Public,
State of New York
No. 31-2161205
Qualified in New York County
Commission Expires March 30, 1963

(SEAL)